

\*\*Original filed 8/16/06\*\*

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARIO V. VENTURA,

Plaintiff,

vs.

KEVIN POUGH, et al.,

Defendants.

No. C 05-1814 JF (PR)

ORDER GRANTING  
PLAINTIFF'S MOTION TO  
PROCEED WITH ORIGINAL  
COMPLAINT; DENYING  
MOTION TO ADD TO  
COMPLAINT WITHOUT  
PREJUDICE; DENYING  
MOTION FOR  
APPOINTMENT OF  
COUNSEL WITHOUT  
PREJUDICE; GRANTING  
REQUEST FOR STATUS

(Docket Nos. 9, 10, 11, 15)

Plaintiff, a state prisoner proceeding pro se, filed a civil rights complaint pursuant to 42 U.S.C. § 1983 against Menlo Park Police Officers Kevin Pough and Joseph Hinkston, the Menlo Park Police Chief, and the City of Menlo Park. Plaintiff has been granted leave to proceed in forma pauperis in a separate order. On July 5, 2005, Plaintiff filed a motion to amend the complaint to include additional claims and documentation. On August 8, 2005, Plaintiff filed an amendment to the complaint to add further allegations, which was filed as an amended complaint. On October 19, 2005, the Court

1 granted Plaintiff's motion to amend the complaint. The Court directed Plaintiff to file a  
 2 second amended complaint within thirty days or to notify the court that he wished to  
 3 proceed with his original complaint, filed on May 2, 2005 and did not intend to include  
 4 the additional documents and allegations in his complaint.

5 On November 16, 2005, Plaintiff filed a motion to proceed with the original  
 6 complaint, a motion to add to the complaint to include additional allegations against the  
 7 City of Menlo Park and the Menlo Park Police Department and a motion for appointment  
 8 of counsel. The Court will GRANT Plaintiff's motion to proceed with the original  
 9 complaint (docket no. 9), DENY Plaintiff's motion to add to the complaint without  
 10 prejudice (docket no. 10) and DENY Plaintiff's motion for appointment of counsel  
 11 without prejudice (docket no. 11).

## 12 DISCUSSION

### 13 A. Motion to Proceed With Original Complaint and Motion to Add to the Complaint

14 In response to the Court's October 19, 2005 order, Plaintiff filed a motion to  
 15 proceed with his original complaint, filed on May 2, 2005. Plaintiff also filed a motion to  
 16 add to the complaint with further allegations against the City of Menlo Park and the  
 17 Menlo Park Police Department.

18 As set forth in the Court's previous order, a plaintiff may amend his complaint  
 19 once as a matter of course at any time before a responsive pleading is served. See Fed. R.  
 20 Civ. P. 15(a). An amended complaint filed as a matter of course or after leave of court  
 21 supersedes the original complaint. "[A] plaintiff waives all causes of action alleged in the  
 22 original complaint which are not alleged in the amended complaint." London v. Coopers  
 23 & Lybrand, 644 F.2d 811, 814 (9th Cir. 1981). Defendants not named in an amended  
 24 complaint are no longer defendants. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th  
 25 Cir.1992). These rules govern actions filed by pro se litigants as well as litigants  
 26 represented by counsel. See King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987) (original  
 27 complaint that was not incorporated into pro se litigants' unsolicited amended complaint  
 28

1 was properly ignored).

2 Because it was unclear to the Court whether Plaintiff intended to proceed with the  
 3 one-page amended complaint, the Court dismissed the amended complaint with leave to  
 4 amend to file a second amended complaint including all of Plaintiff's claims and  
 5 documentation. The Court directed Plaintiff to file a second amended complaint to  
 6 incorporate his original complaint and the additional claims and allegations in his later  
 7 filings or to notify the Court that he wished to proceed with his original complaint.  
 8 Plaintiff cannot proceed with the original complaint and also file a motion to add to his  
 9 complaint unless he files a second amended complaint to incorporate all of his claims and  
 10 supporting documentation. Accordingly, Plaintiff's motion to proceed with the original  
 11 complaint (docket no. 9) is GRANTED. Plaintiff's motion to add to the complaint  
 12 (docket no. 10) is DENIED without prejudice. If Plaintiff wishes to add claims or  
 13 Defendants beyond his original complaint, he shall file a second amended complaint  
 14 **within thirty days** of the date of this order. If Plaintiff does not file a second amended  
 15 complaint as of this deadline, the Court will review the original complaint filed on May 2,  
 16 2005.

17 B. Motion for Appointment of Counsel and Request for Status

18 Plaintiff filed a motion for appointment of counsel. Plaintiff maintains that  
 19 appointment of counsel is necessary because he is incarcerated at Corcoran State Prison  
 20 and has limited access to the law library due to program requirements, shared prison yard  
 21 access to the library, prison lockdowns, and staff training. See Pl.'s Mot. at 1.

22 However, there is no constitutional right to counsel in a civil case. Lassiter v.  
 23 Dep't of Social Services, 452 U.S. 18, 25 (1981). 28 U.S.C. § 1915 confers on a district  
 24 court only the power to "request" that counsel represent a litigant who is proceeding in  
 25 forma pauperis. 28 U.S.C. § 1915(e)(1). This does not give the courts the power to make  
 26 "coercive appointments of counsel." Mallard v. United States Dist. Court, 490 U.S. 296,  
 27 310 (1989).

1 The court may ask counsel to represent an indigent litigant under § 1915 only in  
2 “exceptional circumstances,” the determination of which requires an evaluation of both  
3 (1) the likelihood of success on the merits and (2) the ability of the plaintiff to articulate  
4 his claims pro se in light of the complexity of the legal issues involved. See Rand v.  
5 Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997); Terrell v. Brewer, 935 F.2d 1015, 1017  
6 (9th Cir. 1991); Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986). Both of  
7 these factors must be viewed together before reaching a decision on a request for counsel  
8 under § 1915. See id. Neither the need for discovery, nor the fact that the pro se litigant  
9 would be better served with the assistance of counsel, necessarily qualify the issues  
10 involved as complex. Rand, 113 F.3d at 1525 (where plaintiff’s pursuit of discovery was  
11 comprehensive and focused and his papers were generally articulate and organized,  
12 district court did not abuse discretion in denying request for counsel). Plaintiff’s claims  
13 appear to be relatively straightforward and the Court has yet to review the complaint and  
14 if appropriate, order service on the Defendants. Accordingly, the Court concludes that  
15 appointment of counsel is not necessary at this time. Plaintiff’s motion for appointment  
16 of counsel (docket no. 11) is DENIED without prejudice. Plaintiff’s request for status  
17 (docket no. 15) is GRANTED. The Clerk shall send a copy of the docket sheet to  
18 Plaintiff.

### 19 CONCLUSION

20 1. Plaintiff’s motion to proceed with the original complaint (docket no. 9) is  
21 GRANTED.

22 2. Plaintiff’s motion to add to the complaint (docket no. 10) is DENIED  
23 without prejudice. If Plaintiff wishes to add to his original complaint, he shall file a  
24 second amended complaint **within thirty days** of the date of this order. If Plaintiff does  
25 not file a second amended complaint as of this deadline, the Court will review the original  
26 complaint filed on May 2, 2005. The second amended complaint must include the  
27 caption and civil case number used in this order (05-1814 JF (PR)) and the words  
28

1 “SECOND AMENDED COMPLAINT” on the first page. Because an amended  
2 complaint completely replaces the original complaint, Plaintiff must include in it all the  
3 claims he wishes to present. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir.), cert.  
4 denied, 113 S. Ct. 321 (1992). Any claims and Defendants not included in the second  
5 amended complaint will not be considered by the Court. See King v. Atiyeh, 814 F.2d  
6 565, 567 (9th Cir. 1987). Plaintiff may not incorporate material from the original  
7 complaint, such as supporting documentation or exhibits, by reference. **Plaintiff must**  
8 **include all his claims and any documentation and supporting information in the**  
9 **second amended complaint. Failure to amend within the designated time will result**  
10 **in the Court proceeding with the original complaint filed on May 2, 2005.**

11 3. Plaintiff’s motion for appointment of counsel (docket no. 11) is DENIED  
12 without prejudice.

13 4. Plaintiff’s request for status (docket no. 15) is GRANTED. The Clerk shall  
14 send a copy of the docket sheet to Plaintiff.

15 5. It is Plaintiff’s responsibility to prosecute this case. Plaintiff must keep  
16 the Court informed of any change of address by filing a separate paper with the clerk  
17 headed “Notice of Change of Address.” He must comply with the Court’s orders in a  
18 timely fashion or ask for an extension of time to do so. Failure to comply may result in  
19 the dismissal of this action pursuant to Federal Rule of Civil Procedure 41(b).

20 IT IS SO ORDERED.

21 DATED: 8/16/06

  
JEREMY FOGEL  
United States District Judge

1 A copy of this ruling was mailed to the following:

2 Mario V. Ventura  
3 J-11388  
05-1810CSATF/ C-8 210  
4 P.O. Box 5248  
Corcoran, CA 93212  
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